IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 22, 2009

STATE OF TENNESSEE v. ANDREW ALLEN CROSS

Direct Appeal from the Circuit Court for Marshall County
No. 08-CR-104 Robert Crigler, Judge

No. M2009-00382-CCA-R3-CD - Filed August 20, 2009

The Defendant, Andrew Allen Cross, pled guilty to two counts of sale of less than .5 grams of a Schedule II controlled substance, a Class C felony, and to two counts of delivery of less than .5 grams of a Schedule II controlled substance, a Class C felony. The trial court merged the delivery counts into the sale counts and sentenced the Defendant to an effective sentence of four years and six months in the Tennessee Department of Correction. The Defendant now appeals, claiming that the trial court erred by denying him a community corrections sentence. After a thorough review of the record and the applicable law, we affirm the trial court's judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Andrew Jackson Dearing, III (on appeal), Shelbyville, Tennessee, and William Harold (at sentencing hearing), Shelbyville, Tennessee, for the Appellant, Andrew Allen Cross.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Matthew Bryant Haskell, Assistant Attorney General; Chuck Crawford, District Attorney General; Weakley E. Barnard, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION
I. Facts
A. Guilty Pleas

This case involves two instances where the Defendant sold and delivered Schedule II drugs. At the guilty plea hearing, the State recounted the events giving rise to the Defendant's charges:

> The State's witnesses are available. Were they called to the stand, they would

testify concerning counts 1 and 2 of this indictment; that all of these counts occurred in Marshall County, Tennessee, they would testify; that the first two counts occurred on April 3rd, 2006.

The Marshall County Sheriff's Department was working with a confidential informant. They arranged for the confidential informant to go out with some marked money and a body wire.

The confidential informant drove to a location under observation of these law enforcement officers here in Marshall County, Tennessee, where they saw her meet with the defendant. She was – also had camera equipment in the vehicle.

And there was an arrangement made to purchase some narcotics. There was a – locations were changed. She gave the confidential informant – the confidential informant gave the defendant money to make a purchase of cocaine.

He brought that cocaine back to her. The cocaine was properly bagged, tagged and labeled and analyzed, and it was determined to be less than .5 grams and determined to be cocaine base by the TBI crime laboratory.

Then the confidential informant would testify to the identity of the defendant, as well as the officers, as well as – it wasn't Cecil B. DeMille quality video, but it was videotaped.

Concerning counts 3 and 4, where the State has amended the date on count 4, the same confidential informant and the same law enforcement agency here in Marshall County, Tennessee, on April 10th, 2006, were – again sent the confidential informant out with marked money, a body wire and the cameras. And, again, she made contact with the defendant.

There was an exchange of money for drugs. Again, this was audio and videotaped.

The confidential informant would testify that she made the purchase from the defendant.

Law enforcement officers not only were using a video camera, but they were also using binoculars and had this situation under observation, and they could also identify the defendant.

The substance was properly bagged, tagged and labeled, and it was determined to be cocaine base, a Schedule II controlled substance, in an amount less than .5 grams.

The Defendant pled guilty to two counts of sale of less than .5 grams of a Schedule II controlled substance and two counts of delivery of less than .5 grams of a Schedule II controlled substance. Each count of delivery was merged with the corresponding conviction for sale.

B. Sentencing Hearing

The trial court held a sentencing hearing where the following evidence was presented: Probation Officer Jamie Staggs testified that she prepared the Defendant's presentence report, which the trial court admitted into evidence. She said the Defendant had been unable to make bond since his arrest. She also stated that the Defendant told her he realized that selling cocaine was "not the right thing to do" and that he was wrong for so doing. Staggs said the Defendant said he got the drugs from people who were on the street but who are now incarcerated. He only knew the people's nicknames, as opposed to their legal names. Staggs testified the Defendant was on active probation when he committed the offenses in this case, and he had a misdemeanor probation violation and three failure to appear convictions in his past. Staggs related that the Defendant dropped out of high school in eleventh grade and that he had used "pot" and cocaine. Additionally, she said that the Defendant falsely claimed to work at ITW Shipper's, Inc. and that the Defendant owed $421 per month in child support. On cross-examination, Staggs said the Defendant indicated to her that he did not regularly sell drugs but that he sold drugs this time to provide for his children.

The Defendant then issued an allocution where he apologized for his actions and asked the court for leniency:

> Your Honor, I just feel that I have served enough time for what I did. Everybody makes a mistake. I am sorry for what I did.
>
> Being in jail this time, you know what I'm saying, I stopped before everything happened, but being in jail this time made me realize it doesn't matter, no matter how much money, it is not worth your freedom. All I want is a chance to be a husband and a father to my kids, and a son to my mother and family that needs me.

The presentence report stated that the Defendant had prior convictions for resisting arrest, failing to appear, shoplifting, possession of unlawful drug paraphernalia, possession of drugs, possession of prohibited weapons, and three instances of probation violations. The presentence report also contained a statement from the Defendant where he admitted using drugs to be "calm." He said he used marijuana several times a month, and he only used cocaine once or twice in his life. The Defendant apologized for his actions and asked for community corrections:

> Well at the time I thought I was doing what was best for me and my family. I realize it was not and stop[ped] doing what I was doing in April 2006. I didn't know I had any dope charges pending. I stopped on my own before I got charges put on me. So

> I guess you could say I stopped before something really bad had happen[ed]. I am sorry for all the trouble that I have cause[d]. I am sorry for that. I felt that the time that I am putting in will be en[ough] time served for my crime. I will have a 197 days in when I got back [to] court Jan-07-09. All they ask for is 165 days for community corrections. All I am [sayinng is that] everyone makes a mistake. I am standing up like a man and admitting my wrong. And all I am ask for is a chance to be a husband to my wife and father to my children. They need me it's been really hard on my wife and children and mother since I been in here.

The presentence report also contained a section in which the Defendant then answered questions from Officer Staggs about his drug activities:

> **Q [Officer Staggs]:** How long did you sell drugs?
>
> **A [the Defendant]:** I really wasn't a seller. I mean, I just got out there and tried something.
>
> **Q:** So you were a go-between?
>
> **A:** Yes. I tried it out. I stopped doing it. I only tried it out that one time. It ended up biting me in the butt. They didn't get me [un]til[] two years later.
>
> **Q:** Who did you get the drugs from?
>
> **A:** Like certain people on the street. Most of them are locked up. They sent them to the Pen.
>
> **Q:** Can you be more specific?
>
> **A:** One, his nickname is Suge. I don't know his real name.
>
> **Q:** How did you get involved?
>
> **A:** That was it. I got out there to try to get a little extra money for food, gas, clothes. I tried to do it a couple of times, s[aw] I wasn't good at it and stopped. Th[ose] couple of time[s] got me messed up. I'm locked up.
>
> **Q:** Were you using drugs?
>
> **A:** No.

After hearing the evidence presented, the trial court ordered the Defendant to serve four years and six months in confinement for the two counts of sale of less than .5 grams of a controlled

substance. The trial court merged the Defendant's convictions and sentences for delivery of controlled substances into his convictions and sentences for selling controlled substances. The trial court then ordered him to serve his sentences concurrently in confinement. The Defendant now appeals, claiming that the trial court erred by denying him a community corrections sentence.

II. Analysis

The Defendant argues that the trial court erred when it ordered him to serve his sentence in confinement, contending the trial court should have sentenced him to community corrections. The State argues that the trial court properly exercised its discretionary authority to impose a sentence of incarceration based on the Defendant's prior criminal history, his misrepresentations about his employment, and his probation violations.

When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d); *State v. Mencer*, 798 S.W.2d 543, 549 (Tenn.Crim.App.1990) (finding community corrections to be a form of alternative sentencing and therefore holding the de novo standard of review of T.C.A. § 40-35-402(d) to apply to community corrections). As the Sentencing Commission Comments to this section note, the burden is on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001).

Pursuant to the 2005 amendments to the Tennessee sentencing statutes, a defendant is no longer presumed to be a favorable candidate for alternative sentencing. *State v. Carter*, 254 S.W.3d 335, 347 (Tenn.2008) (citing T.C.A. § 40-35-102(6) (2006)). Instead, a defendant not within "the parameters of subdivision (5) [of T.C.A. § 40-35-102], and who is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." *Id.* (footnote omitted). T.C.A. § 40-35-102(6); 2007 Tenn. Pub. Acts 512. Additionally, we note that a trial court is "not bound" by the advisory sentencing guidelines; rather, it "shall consider " them. T.C.A. § 40-35-102(6).

In conducting a de novo review of a sentence, we must consider: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the mitigating and enhancement factors set out in Tennessee Code Annotated sections 40-35-113 and -114; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and (7) any statement the defendant made in the defendant's own

behalf about sentencing. *See* T.C.A. § 40-35-210 (2009); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). We must also consider the potential or lack of potential for rehabilitation or treatment of the defendant in determining the sentence alternative or length of a term to be imposed. T.C.A. § 40-35-103 (2009).

When sentencing the defendant to confinement, a trial court should consider whether:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103(1)(A)-(C) (2006).

The Tennessee Community Corrections Act was enacted in 1985. One of the purposes of the Act was "to establish a policy within the state to punish selected, nonviolent felony offenders in front-end community based alternatives to incarceration, thereby reserving secure confinement facilities for violent felony offenders." Tenn. Code Ann. § 40-36-103(1) (2006); *see State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001). Under the Act, a court is authorized to sentence an eligible defendant, as defined in Tennessee Code Annotated section 40-36-106, to "any appropriate community-based alternative to incarceration provided in accordance with the terms of this chapter, and under such additional terms and conditions as the court may prescribe, in lieu of incarceration in a state penal institution or local jail or workhouse." T.C.A. § 40-36-106(e)(1) (2006).

A defendant must meet the following factors to be eligible to serve his sentence within a community corrections program:

> (B) Persons who are convicted of property-related, or drug-or alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5;
> (C) Persons who are convicted of nonviolent felony offenses;
> (D) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;
> (E) Persons who do not demonstrate a present or past pattern of behavior indicating violence;
> (F) Persons who do not demonstrate a pattern of committing violent offenses;

T.C.A. § 40-36-106(a)(1) (2006). A trial court retains discretion to deny community corrections if it finds the sentencing principles to require confinement. *State v. Kendrick*, 10 S.W.3d 650, 656 (Tenn.Crim.App.1999).

In the case under submission, the trial court applied several enhancement and mitigating factors and sentenced the Defendant to four years and six months in the Tennessee Department of Correction. The trial court explained its denial of alternative sentencing:

> First off, I do find the defendant was not truthful about his employment. When they attempted to verify his employment at ITW, they said he had never worked there. It appears that his ending date of 8-1-07 on that other employment is not accurate. That is not when he was locked up. His education is poor. He has had probation violations. He does have a criminal history, albeit no felony charges.
>
> And because less restrictive measures than confinement have both frequently and recently been applied unsuccessfully to the defendant, and also because I consider him a poor candidate for probation, I am going to deny alternative sentencing.

Therefore, the record shows the trial court denied the Defendant community corrections because of his criminal history, his past failures to comply with measures less restrictive than confinement, and his misrepresentations about his employment history.

After a careful review, we conclude that the trial court was within its discretion when it denied the Defendant alternative sentencing. The Defendant is a standard offender, and his convictions at issue are Class C felonies. Therefore, he is a "favorable candidate" for alternative sentencing, absent evidence to the contrary. *See Carter*, 254 S.W.3d at 347. Also, because the Defendant's present convictions do not involve the use of a weapon or violence and were not committed against a person, the Defendant meets the additional requirements necessary for community corrections. *See* T.C.A. § 40-36-106(a)(1). These qualifications, however, do not entitle the Defendant to a community corrections sentence. *See State v. Ball*, 973 S.W.2d 288, 294 (Tenn. Crim. App. 1998); *State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). In our view, the Defendant's criminal history, and the Defendant's failure to comply with measures less restrictive than confinement in the past support the trial court's judgment that confinement was appropriate.

First, the Defendant's criminal history indicates confinement is necessary. T.C.A. § 40-35-103(1)(A) authorizes a court to deny alternative sentencing if "confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct." The Defendant has many criminal convictions, ranging from resisting arrest to drug offenses. These convictions support the trial court's conclusion that the Defendant has a long history of criminal conduct. *See* T.C.A. § 40-35-103(1)(A). We conclude, as the trial court found, that the Defendant's criminal history requires a sentence of confinement.

Secondly, the fact that measures less restrictive than confinement have recently been applied to the Defendant without success also supports the trial court's decision. T.C.A. § 40-35-103(1)(C). The record shows that the Defendant has violated past sentences of probation and that he was on probation when he committed the offenses in this case. Therefore, measures less restrictive than confinement have frequently been applied unsuccessfully to the Defendant. *See* T.C.A. § 40-35-103(1)(C).

In summary, the Defendant's history of criminal conduct and his past failures to comply with measures less restrictive than confinement justify the Defendant's confinement. We conclude that the trial court properly found that sentencing principles required the Defendant's confinement. Therefore, the trial court properly denied Defendant's request for a community corrections sentence. He is not entitled to relief on this issue.

III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the judgments of the trial court.

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ROBERT W. WEDEMEYER, JUDGE